

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 2/11/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

James E. and Patricia C. Watkins,

Complainants,

vs.

MCI-Metro Access Transmission Services
(MCI/WORLDCOM), Inc.,

Defendant.

Case 04-07-043
(Filed July 30, 2004)

OPINION GRANTING MOTION TO DISMISS

Summary

This decision dismisses the complaint for failure to show a violation of law or order upon which the Commission can grant relief.

Background

James E. and Patricia C. Watkins (Watkins or complainants) allege that MCI Metro Access Transmission Services (MCI) violated various Commission regulations and decisions, as well as state and federal law, in telephone services provided to complainants. Complainants' major factual allegations against MCI include fraudulent billing, invasion of privacy, and breach of a settlement agreement.

The complainants seek a Commission order directing MCI to: (1) cease and desist all violations; (2) pay punitive damages in excess of \$5.8 million; (3) make all required refunds; and (4) provide for all remedies and damages available under state law.

MCI answered that in August 2003 it had received an informal complaint from James E. Watkins regarding a disruption in telephone service. That informal complaint was resolved with a settlement agreement signed by MCI and complainants on October 6, 2003. MCI stated that it fully performed its duties pursuant to the settlement agreement. MCI concluded that the complaint should be dismissed because it failed to state any claim upon which relief can be granted, as MCI had fully complied with the terms of the settlement agreement and the Commission lacked jurisdiction to award damages.

MCI subsequently filed and served its Motion for Summary Judgment. MCI contended that the 2003 settlement agreement bars complainants from re-asserting the violations resolved by the 2003 settlement agreement. MCI provided a copy of the 2003 informal complaint and showed that paragraphs 5 through 60 of the instant complaint are identical to paragraphs 5 through 60 of the 2003 informal complaint. MCI asserted that complainants are barred from re-asserting the alleged violations included in paragraphs 5 through 60 of the complaint.

MCI also addressed paragraphs 61 through 65 of the complaint, which contend that MCI has only paid \$10,000 of the \$30,000 required by the agreement. MCI provided, under seal, a copy of the settlement agreement, which supported its contention that it has fully met its financial obligations pursuant to the agreement. MCI argued that complainants' contention that MCI agreed to pay \$30,000 is completely unsubstantiated and directly contradicted by

the written settlement agreement. MCI concluded that complainants have failed to demonstrate that a triable issue of material fact exists with regard to the cause of action set forth in the complaint, and that MCI is entitled to summary judgment in its favor.

In their response to MCI's motion, complainants state that the complaint alleges on-going fraud by MCI, not just the 2003 violation. They contend that MCI fraudulently billed them \$32.52 in 2003 and that MCI's July 23, 2004, billing for \$32.36 was similarly fraudulent. The complainants argue that "an amount that is near identical to the admitted fraudulent 2003 amount of \$32.52 suggests that MCI is using a computer program to generate false billing in an amount that is small enough that it will not be scrutinized by the average customer." Complainants' response, at page 2. The complainants conclude that the Commission should determine the extent of MCI's fraud.¹

Complainants also filed a motion seeking discovery order directing MCI to provide them "full and complete access to all records of accounts, all files written and electronic, all tapes and disc's, and access to all computer software used to program all billing and invoices and all computer memory disc's and server memory disc's used to store all records of accounts." Complainants alleged that this information was necessary for them to determine whether MCI has violated "California Penal Code Section 186.11," which complainants contend applies to "criminal extortion activity."

MCI responded that the 2004 charges assessed to complainants were consistent with MCI's Commission-approved tariffs, and that complainants paid

¹ Complainants' response also repeated many of the paragraphs included in its complaint.

the charges in full and without dispute. MCI also noted that the complainants left MCI's service on July 23, 2004, and that all charges were for service rendered prior to that date. MCI objected to the requested discovery order on relevancy grounds, and alleged that the information sought was burdensome and would require disclosure of proprietary programs and materials, as well as private customer information.

Discussion

Pursuant to § 1702,² this Commission may entertain any complaint that sets "forth any act or thing done or omitted to be done by any public utility, . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." The complaint fails to meet this standard and we therefore dismiss it. (*See AC Farms Sherwood vs. Southern California Edison Company*, Decision (D.) 02-11-003.)

All claims stated in the informal 2003 complaint are barred by the settlement agreement.³ Complainants do not dispute that MCI has made the payment specified in the written agreement. Complainants offer no evidentiary support to contradict the written terms of the agreement. As MCI has performed its obligations under the terms of the settlement agreement, complainants are similarly held to their waiver of all claims included in the 2003 informal complaint.

² All statutory citations are to the Public Utilities Code unless otherwise indicated.

³ The assigned ALJ inspected the settlement agreement, which has been placed under seal. All specific facts included in this decision are from public pleadings filed by the parties.

In their response to MCI's motion for summary judgment, complainants raise, for the first time, allegations that MCI improperly billed them for \$32.36 in 2004. MCI has provided a detailed analysis in a sworn declaration showing that the charges were properly assessed, and that complainants paid the charges.

Moreover, this Commission has no jurisdiction to award punitive damages for the torts or criminal violations alleged by complainants. Our jurisdiction is limited to reparations and cancellation of improper charges. (*Goncharov v. Southern California Gas Company* (1993) D.93-04-003; *L.T.J. Industries v. Pac Tel* (1976) 80 CPUC 836; *Blincoe v. Pac Tel* (1963) 60 CPUC 432.)

This Commission also lacks jurisdiction to adjudicate state or federal criminal allegations such as those complainants assert are found in "California Penal Code Section 186.11."

In sum, complainant has not shown any violation of law or Commission rule over which we have jurisdiction, and we dismiss the complaint accordingly. Consequently, we also deny the complainants' motion for discovery.

Need for Hearing

There are no disputed issues of material fact necessary to decide this motion to dismiss. Consequently, no evidentiary hearings are necessary and Article 2.5 of the Commission's Rules of Practice and Procedure ceases to apply to this proceeding, with the exception of the ex parte prohibition in Rule 7.

Assignment of Proceeding

Dian M. Grueneich is the Assigned Commissioner and Maribeth A. Bushey is the assigned Administrative Law Judge (ALJ) in this proceeding.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. MCI and complainants entered into a settlement agreement dated October 6, 2003, which resolved all allegations in complainants' 2003 informal complaint and prohibited complainants from re-asserting the allegations.
2. Paragraphs 5 through 60 of this complaint restate allegations made in the 2003 complaint.
3. MCI has made the payment required by the written settlement agreement.
4. Complainants' allegation that the actual settlement agreement provided for additional payments is unsupported and contradicted by the written agreement.
5. Complainants' additional allegations of improper billing in 2004 were based solely on the similarity of the 2004 sum to the 2003 sum.
6. Complainants' allegations of fraudulent billing in 2004 were unverified and raised for the first time in response to the motion to dismiss.
7. MCI presented a sworn declaration, with supporting documentation, showing that the 2004 charges were consistent with its tariffs.
8. Complainants seek damages.
9. The facts necessary to rule on the motion to dismiss are not disputed.

Conclusions of Law

1. Complainants have not shown any violation of law or rule over which this Commission has jurisdiction.
2. No hearing is necessary.

3. The Complaint should be dismissed for failure to state a claim under § 1702, effective immediately.
4. The request for discovery should be denied.

O R D E R

IT IS ORDERED that:

1. The complaint in Case (C.) 04-07-043 is dismissed.
2. No hearing is necessary.
3. C.04-07-043 is closed.

This order is effective today.

Dated _____, at San Francisco, California.